

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALICE BRADFORD)	
Claimant)	
VS.)	
)	
PIONEER BALLOON)	Docket No. 256,803
Respondent)	
AND)	
)	
WAUSAU UNDERWRITERS INSURANCE)	
COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals from the February 27, 2003 Award Nunc Pro Tunc of Administrative Law Judge John D. Clark. The Kansas Workers Compensation Appeals Board (Board) heard oral argument on August 20, 2003.

APPEARANCES

Claimant appeared by her attorney, Jan L. Fisher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Christopher J. McCurdy of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

- (1) Did claimant suffer personal injury by accident on the dates alleged?
- (2) Did claimant's accidental injuries arise out of and in the course of her employment with respondent?

- (3) What is the nature and extent of claimant's injury and disability? Claimant alleges entitlement to a work disability under K.S.A. 1999 Supp. 44-510e. Respondent contends claimant should be limited to a functional impairment only, arguing she has returned to work with respondent and is capable of earning a comparable wage. Additionally, respondent alleges entitlement to a deduction under K.S.A. 1999 Supp. 44-501(c) for the amount of functional impairment determined to preexist claimant's alleged injury.
- (4) Is respondent entitled to a credit for overpayment of temporary total disability compensation pursuant to K.S.A. 1999 Supp. 44-525?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds as follows:

Claimant began working for respondent on October 13, 1997, as a production auditor. This job involved making sure that there were either 250 or 500 balloons in a box and that they were all properly labeled and had no flaws. Claimant performed this job for over two years without difficulty. In November 1999, claimant was transferred temporarily to a position of pulling balloons from the belt. This required that she sit in front of a belt, lean forward and remove balloons from the belt every three to five seconds. It is acknowledged in the record there is a dispute between claimant and respondent as to the amount of leaning required in this job. Claimant testified she began having pain in her low back after beginning this job. She performed this job for approximately two weeks and then was transferred off the job. When she left that job, her back returned to normal. It should be noted claimant had a history of low back problems beginning as early as 1993 when she lifted a 40-pound dog onto a veterinarian's table. Claimant underwent chiropractic care for approximately six months to a year after that incident. She would then occasionally see a chiropractor for maintenance, experiencing intermittent problems which generally resolved.

During the last two weeks of December 1999, claimant was again moved to the balloon pulling job. She again began experiencing pain in her low back. After performing the job for approximately two weeks, claimant was transferred from the job and her back returned to normal. In mid February 2000, claimant was again transferred to the balloon pulling job. She continued working that job into March 2000, again experiencing low back pain. However, claimant soon began experiencing pain radiating down her left leg. Claimant had experienced pain radiation down the right leg in 1993, but this was the first time she had experienced pain radiation down her left leg.

Claimant sought additional chiropractic care with M. D. McCormac, D.C., of the Augusta Chiropractic Clinic. Claimant testified that the previous chiropractic treatment had always helped her back. However, in this instance, claimant's back did not improve. Claimant sought treatment with Ronald M. Varner, D.O., an osteopathic physician, on April 5, 2000. Dr. Varner had been treating claimant since 1990 and was aware of her preexisting low back problems. In 1993, claimant underwent an MRI, which showed she had a posterolateral disc herniation at L5-S1. She was referred to Gregg M. Snyder, M.D., a neurosurgeon, and also to Eustaquio O. Abay, II, M.D. Conservative treatment was recommended.

In April of 2000, Dr. Varner ordered another MRI, which showed marked central stenosis at L5-S1 due to a combination of arthritic changes and a bulging disc plus spondylolisthesis at L5-S1. There was also mild to moderate stenosis at L4-5 with arthritic changes. He indicated this was a progressive change from the 1993 examination. Dr. Varner testified that claimant's job duties with respondent definitely aggravated her preexisting back problems. He went on to state that one of the worst things that can happen to a back is repetitive flexion coupled with side-to-side bending and rotation. He testified the spondylolisthesis probably developed over a long period of time, as opposed to a single traumatic event, but acknowledged the diagnosis and cause is unknown with any specific exactness. He stated claimant's low back problems were of multiple etiology.

Claimant was ultimately referred from Dr. Varner to board certified orthopedic surgeon Robert L. Eyster, M.D., who first examined claimant on July 28, 2000. Dr. Eyster diagnosed spondylolisthesis with spinal stenosis at L5-S1, which was impinging upon the nerve. He testified that spondylolisthesis can be the result of a stress fracture or can be a congenital situation which did not properly heal. He opined that claimant's condition did preexist her employment with respondent, but also testified that the work claimant performed for respondent aggravated this preexisting condition. He ultimately performed a spinal fusion on claimant on December 11, 2000. The fusion plus the accompanying decompression improved claimant's symptoms. He treated claimant through March 6, 2002, at which time he released claimant, recommending that she sit 10 minutes out of every hour. He assessed claimant a 19 percent impairment to the body as a whole, which included a 12 percent whole body impairment for the two-level fusion and an additional 7 percent to the body for loss of range of motion with the neurologic irritation to the left leg. He returned claimant to work with restrictions, which originally prohibited claimant from working more than 6 hours a day. He did testify that claimant could eventually work up to 8 hours a day. In his response to the May 30, 2002 letter from respondent's attorney, Dr. Eyster confirmed that he did not place any restriction on the number of hours which claimant could work and that claimant should be able to work 8 hours a day. He assessed claimant a 19 percent impairment to the body as a whole, but opined that 90 percent of that was preexisting, with only 10 percent due to the current injury. He utilized the DRE table of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), in reaching claimant's functional impairment, but it does not appear from his

testimony that the *AMA Guides* were specifically used when he determined the amount of preexisting impairment claimant suffered.

When asked about the significance of lifting versus bending and its effect on a back, Dr. Eyster opined that if he were limit any activity, it would be forward bending. Regardless of the amount of bending claimant was involved in, in his opinion it has a definite negative effect on an injured back.

Claimant did return to work for respondent, working up to 6 hours a day. Claimant's hours varied, but from the record, the most claimant worked at any time after her surgery was 6 hours a day. Claimant did not attempt to return to work 8 hours a day, although she was offered a position within her restrictions, working 8 hours a day. At that time, claimant explained she was exhausted by the time she went home and was at that time diagnosed as being close to pneumonia. Claimant did not feel she was physically able to increase her hours at that time.

Claimant was referred to board certified orthopedic surgeon Sergio Delgado, M.D., at claimant's attorney's request. He examined claimant on February 5, 2002, and later was provided the April 7, 2000 MRI report to review. He diagnosed claimant with spondylolisthesis at L4 and L5, with indications of degenerative changes at L4 and L5, spinal stenosis and nerve compression. The MRI reports from 1993 through 2000 indicated a progressive change, which he determined to be an indication of long-term degenerative problems. He was provided and viewed a videotape of the job duties which respondent alleged claimant performed. There is a dispute about whether the particular job on the videotape is the same job claimant worked, with various witnesses testifying pro and con on that issue.

Even after viewing the videotape, Dr. Delgado felt that the job aggravated claimant's preexisting impairment. He testified that bending and/or twisting increases the amount of pressure on the lower lumbar area and the bending could be slight and still have a negative effect on a low back. Slight bending, coupled with repetitive activity, can, in his opinion, be an aggravating factor.

Dr. Delgado found claimant to have a 25 percent impairment to the body as a whole, testifying that claimant's condition fell into DRE lumbosacral category V. He testified that 20 percent of that resulted from the 2000 injury, with approximately 5 percent preexisting under the *AMA Guides*. He stated claimant earlier had a DRE category II injury, which was the basis for his 5 percent preexisting impairment. Both opinions were provided pursuant to the *AMA Guides* (4th ed.). He restricted claimant to alternating sitting and standing every two hours and advised she defer from repetitive lifting more than 10 pounds from the floor, 20 pounds from the waist to overhead and no more than 20 pounds occasionally from the floor. She could lift 30 pounds repetitively from the waist to overhead. He also

cautioned that she avoid repetitive bending, twisting or stooping. When advised that claimant was only working 6 hours a day, he advised that was reasonable, although he did not specifically restrict her from working additional hours. When asked whether she could work an 8-hour day, he stated that it was a matter of trial and error. If she was capable of tolerating the 8 hours, that would be fine. He would not be contrary to her working 8 hours per day, but indicated it was something claimant would have to discover.

Dr. Delgado was provided a task list compiled by Dick Santner, showing twenty-four tasks. Dr. Delgado opined that claimant was able to perform twenty-three of the twenty-four tasks, for a 4 percent task loss.

Claimant was referred to C. Reiff Brown, M.D., a board certified orthopedic surgeon, to perform an independent medical examination at the request of the Administrative Law Judge. He saw claimant on October 12, 2000, diagnosing severe degenerative changes in her lumbar spine, spinal stenosis and degenerative spondylolisthesis at L4-5, all of which he felt preexisted claimant's work activities. After viewing the videotape, Dr. Brown did not believe the activities portrayed on that tape would have caused enough stress on claimant's low back to cause any permanent aggravation of her preexisting condition. As stated earlier, there was a dispute regarding whether the activities on the tape accurately portrayed the duties performed by claimant with respondent.

Dr. Brown had the opportunity to view a CT scan done in March of 1993, the MRI done in 1993 and the MRI done in April of 2000. He did testify that claimant's condition had worsened based upon the findings from the more recent tests. He testified that claimant had a fragile spine and it would not take much to cause her difficulties. He acknowledged that if claimant's bending was sufficiently far enough to migrate the disc, then repetitive bending could result in increased symptoms with permanent aggravation. However, that testimony was somewhat speculative, as he was not totally clear as to how far claimant was required to bend on her job. He stated that bending forward only six inches could be enough to cause the herniation, but did not say so within a reasonable degree of medical probability.

When claimant applied for employment with respondent in 1997, she underwent a preemployment physical with board certified internal medicine specialist Philip S. Olsen, M.D. This physical, which occurred on October 7, 1997, resulted in claimant being allowed to go to work. Dr. Olsen found nothing abnormal in the physical to prohibit claimant from working. However, the history given Dr. Olsen indicated a back strain in 1992, with no indication of preexisting bulging or herniated discs. He was unaware that claimant sought chiropractic care every month from June 1997 into 1998, even during the time he was performing the preemployment physical. Dr. Olsen testified that if he had been aware of these facts, it may have had an effect on his judgment on whether claimant was capable of working for respondent.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.¹ K.S.A. 1999 Supp. 44-501 mandates that an employee suffer personal injury by accident "arising out of and in the course of" employment in order to collect benefits under the Kansas Workers Compensation Act.

The two phrases "arising out of" and "in the course of" used in K.S.A. 1999 Supp. 44-501,

have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."²

In this instance, both Dr. Delgado and Dr. Eyster testified that even slight bending on a repetitive basis would be sufficient to aggravate claimant's preexisting condition. Even Dr. Brown acknowledged that bending sufficiently far enough over to migrate the disc could result in increased symptoms on a permanent basis. The fact that claimant's condition preexisted would not prohibit claimant from collecting benefits. An accidental injury is compensable even where the accident serves only to aggravate a preexisting condition.³

It is acknowledged the trauma experienced by claimant was relatively slight. K.S.A. 1999 Supp. 44-508(d) defines "accident" as,

... an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

¹ K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

² *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

³ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

From this definition, a manifestation of force is not necessary for an incident to be deemed an accident.

Based upon the medical opinions of Dr. Eyster, Dr. Delgado and Dr. Brown, the Board finds that claimant did suffer accidental injury arising out of and in the course of her employment, having aggravated her preexisting condition.

The Board must next consider what, if any, functional impairment claimant suffered as a result of this injury. Dr. Eyster provided claimant a 19 percent impairment to the body as a whole. But he opined that 90 percent of it preexisted claimant's accident. While he alluded to the DRE tables in the *AMA Guides* (4th ed.), he acknowledged that he did not specifically use the DRE or range of motion guidelines. He stated that he used a combination of both.

Dr. Delgado, on the other hand, was specific as to which section of the *AMA Guides* he utilized and how he reached his opinion, both as to claimant's functional impairment and as to any preexisting impairment claimant may have suffered. In dealing both with functional impairment and any preexisting impairment opinions, the Board has held that each must be established by competent medical evidence and ratable under the appropriate edition of the *AMA Guides* if the condition is addressed by those Guides. Here, the only opinion which provides both current and preexisting functional impairment opinions pursuant to the *AMA Guides* is that of Dr. Delgado. The Board finds claimant suffered a 25 percent impairment to the body as a whole as a result of these injuries, of which 5 percent preexisted pursuant to K.S.A. 1999 Supp. 44-501(c).

Claimant also alleges she is entitled to a work disability under K.S.A. 1999 Supp. 44-510e.

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.⁴

The only task loss opinion contained in the record is that of Dr. Delgado. Dr. Delgado opined claimant had lost 4 percent of the task performing abilities as a result of this injury, and the Board adopts that percentage as its own.

⁴ K.S.A. 1999 Supp. 44-510e.

The dispute regarding what, if any, wage loss claimant may have suffered is more complicated. Claimant has returned to work for respondent, earning \$7.75 per hour, but is only working 6 hours per day. Claimant was returned to work on September 27, 2001, by Dr. Eyster. However, this return to work was on a limited basis, with claimant working less than 8 hours per day. At 6 hours per day, earning \$7.75 an hour, claimant would earn \$232.50 per week which, when compared to a \$341.13 average weekly wage, results in a 32 percent loss of wages. However, as of May 30, 2002, in Dr. Eyster's letter to respondent's attorney, Mr. McCurdy, Dr. Eyster opined that claimant would be capable of working 8 hours per day. Dr. Eyster's opinion was supported by Dr. Delgado, who felt that claimant could work up to 8 hours per day, testifying that claimant should attempt it, seeing it as a matter of trial and error. Dr. Eyster saw nothing contrary to claimant's ability to work 8 hours per day.

In determining what, if any, wage loss claimant may have suffered, the Board must also take into consideration the policies set forth by the Kansas Court of Appeals in *Foulk*⁵ and *Copeland*.⁶ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁷

Here, claimant was returned to work with respondent, earning an hourly wage which is comparable to that which she was earning at the time of the accidents. However, claimant is limited to less than 40 hours per week. This limitation from Dr. Eyster ended May 30, 2002, at which time he opined claimant was capable of working an 8-hour day. Up to May 30, 2002, the Board finds that claimant's less than 8-hour per day work constituted a good faith effort on her part, as she was following the instructions of her

⁵ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁶ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁷ *Id.* at 320.

treating physician. The Board will, therefore, award claimant a work disability based upon her 4 percent task loss and a 32 percent wage loss through May 30, 2002.

However, after May 30, 2002, claimant still refused to increase her hours to 8 hours per day, even though an offer to do so was made by respondent. Claimant's self-limitation in this regard did not constitute a good faith effort on claimant's part. As such, the Board will impute a wage to claimant for the period after May 30, 2002, with claimant earning \$7.75 per hour and working an 8-hour day. Based upon that wage and based upon a 40-hour work week, the Board finds claimant capable of earning 91 percent of the wages she was earning at the time of the accident.

K.S.A. 1999 Supp. 44-510e states:

An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

As the imputed wage increases claimant's earning ability to in excess of the 90 percent threshold set by K.S.A. 1999 Supp. 44-510e, the Board finds as of June 1, 2002, claimant would be limited to her functional impairment.

As noted above, the Board finds claimant has a functional impairment of 20 percent when taking into consideration the 5 percent impairment preexisting, all pursuant to the opinion of Dr. Delgado. Therefore, as a June 1, 2002, claimant will be limited to her functional impairment of 20 percent.

Respondent contends that it is entitled to a credit under K.S.A. 1999 Supp. 44-525(c) for any temporary total disability compensation which was overpaid pursuant to K.S.A. 44-534a. Claimant objects to respondent's request for a credit, arguing that the information which supports respondent's request was attached to respondent's submission letter, which was provided to the Administrative Law Judge outside of respondent's terminal date. K.S.A. 1999 Supp. 44-523 allows an administrative law judge to set terminal dates within which a party's evidence must be submitted. The statute does allow the administrative law judge to grant extensions of the time limits if certain criteria are met. However, in this instance, there was no request by respondent to extend its terminal date. Any evidence attached to respondent's submission letter, which was not provided at the time of respondent's terminal date, would not be evidence which could be considered by the Administrative Law Judge, as it is not properly in the record. Additionally, K.S.A. 1999 Supp. 44-555c(a) grants the Board exclusive jurisdiction to review the decisions of the Administrative Law Judge based upon the evidence presented to the Administrative Law Judge. As this evidence was not presented to the Administrative Law Judge in a timely fashion and, therefore, is not contained in the record, the Board cannot consider

respondent's additional evidence. Accordingly, respondent has failed to establish it is entitled to receive a credit for the alleged overpayment of temporary total disability pursuant to K.S.A. 1999 Supp. 44-525.

The Board, therefore, modifies the Award of the Administrative Law Judge to grant claimant a 20 percent impairment of function to the body as a whole. While claimant has also proven a work disability of 18 percent to the body as a whole based upon a 4 percent loss of tasks and a 32 percent loss of wages through May 30, 2002, K.S.A. 1999 Supp. 44-510e(a) states, in part, "[I]n any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment." As claimant's permanent partial general disability computes to 18 percent and claimant's functional impairment is 20 percent, the Board finds claimant is entitled to her 20 percent functional impairment with no additional work disability. Respondent's request for a credit for an overpayment of temporary total disability compensation is denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award Nunc Pro Tunc of Administrative Law Judge John D. Clark dated February 27, 2003, should be, and is hereby, modified to grant claimant an award against the respondent, Pioneer Balloon, and its insurance carrier, Wausau Underwriters Insurance Company, for an accidental injury sustained each and every working day through March 28, 2000. Claimant is entitled to permanent partial general disability compensation based upon her 20 percent functional impairment.

Claimant is entitled to 89.46 weeks temporary total disability compensation at the rate of \$227.59 per week totaling \$20,360.20, followed by 68.11 weeks permanent partial disability compensation representing a 20 percent impairment to the body as a whole on a functional basis at the rate of \$227.59 per week totaling \$15,501.15, for a total award of \$35,861.35, all of which is due and owing and ordered paid in one lump sum, minus any amounts previously paid as of this award.

In all other regards, the Award Nunc Pro Tunc of the Administrative Law Judge is adopted insofar as it does not contradict the findings and conclusions contained herein.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Ireland Court Reporting	
Transcript of Preliminary Hearing	\$323.80

Deposition Services	
Transcript of Preliminary Hearing	\$280.90
Ireland Court Reporting	
Transcript of Regular Hearing	\$204.46
Owens, Brake, Powers & Associates	
Deposition of Ronald M. Varner, D.O.	\$367.04
Appino & Biggs Reporting Service, Inc.	
Deposition of Sergio Delgado, M.D.	\$667.65
Deposition of Dick Santner	\$290.70
Owens, Brake, Powers & Associates	
Deposition of Hedy Mendenhall	\$252.75
Deposition of Philip S. Olsen, M.D.	\$161.79
Deposition of Martha Siemer	\$224.55
Court Reporting Service	
Deposition of Robert L. Eyster, M.D.	\$213.70
Deposition of C. Reiff Brown, M.D.	\$308.50

IT IS SO ORDERED.

Dated this ____ day of November 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

Claimant's entitlement to temporary disability compensation was made an issue at the regular hearing. It is claimant's burden to prove her entitlement to compensation, including that she was temporarily and totally or partially disabled. The majority shifts that burden to respondent. The issue is not whether there was an overpayment, but rather how many weeks of temporary total and/or temporary partial disability compensation is claimant entitled to receive and at what rate.

It is clear that claimant was working during part of the time she was paid temporary total and/or temporary partial disability compensation. However, when claimant worked and how many hours per day or per week she worked is not clear. The record fails to prove that claimant is entitled to the 89.46 weeks of temporary total disability compensation awarded.

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Director